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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-693

GEORGE GORDON REYNOLDS AND WALTER A. MITCHELL,
Petitioners,

v.

TEXAS GULF SULPHUR CO. AND CHARLES F. FOGARTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners George Gordon Reynolds and Walter A. Mitchell, plaintiffs, appellees and cross-appellants in the courts below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah on the merits is reported at 309 F. Supp. 548 and set fourth at page 1a of the Appendix to this Petition. The opinion of the District Court denying the class action is reported at 309 F. Supp. 566 and set forth at page 36a of the Appendix to this petition. The opinion of the Court of Appeals is re-

ported at 446 F.2d 90 and is reproduced at page 49a of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1971. A timely petition for rehearing was denied on September 10, 1971. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §1254 (1). The time for filing this Petition expires December 9, 1971.

QUESTIONS PRESENTED

In a case involving proliferated claims based upon a common question simultaneously asserted by hundreds of persons in several different districts of the United States, affecting the interests of thousands of defrauded shareholders in a single public corporation:

1. Whether the purpose of the Advisory Committee on Federal Rules, to effect economies and efficiences in the judicial process and assure prompt and effective relief to litigants, was frustrated by the lower courts' restrictive reading of revised Rule 23, Federal Rules of Civil Procedure?

2. Whether judicial economies should have been achieved by referring parallel proceedings simultaneously conducted in two separate districts to the Coordinating Committee on Complex and Multi-Party Litigation?

3. Whether substantive rights of parties before the court and absentee class members were denied by a refusal to permit class action proceedings, where an action on any other basis is not economically feasible?

4. Whether plaintiffs who establish a violation of the securities laws by their corporation, and the "common questions" controlling suits by others, should be reimbursed for the costs of establishing the violation, costs of expert witnesses and legal expenses, and if so in what manner?

STATUTE AND RULE INVOLVED

The pertinent provisions of Rule 23, Federal Rules of Civil Procedure (Rule) and the statutory provisions involved, are as follows:

Rule 23, Federal Rules of Civil Procedure:

> (a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> * * * *
>
> (d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; . . . The orders may be combined

with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

28 U.S.C. §1407:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such action may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action. Each action so transferred shall be remanded by the panel on or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this action may be initiated by –

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

STATEMENT OF THE CASE

On April 13, 1964, Texas Gulf Sulphur Company (TGS), acting by and through its Executive Vice President, Respondent Fogarty, published a statement discounting rumors concerning its mineral explorations near Timmins, Ontario, Canada (deceptive release). The rumors had reportedly leaked out because of large purchases of TGS stock by insiders, which had caused a flurry of trading on the stock exchange. Three days later, on April 16, 1964, TGS issued a second press statement confirming the discovery of a mine at Timmins, which has since proven to be one of the most spectacular mining discoveries in history (corrective release). All of the essential information contained in the April 16 release was based upon exploration which had been completed prior to when the deceptive release was prepared, and a materially significant portion of it had been available to TGS since November of 1963.

Petitioners were shareholders in TGS who read the deceptive release and sold their stock on the morning of April 16, before the corrective release was communicated to them or was reasonably available to members of the investing public. In the wake of the disclosure that the deceptive release misstated and omitted mention of material facts, within the meaning of the anti-fraud provisions of federal securities laws,[1] which became known when the United States Securities and Exchange Commission (SEC) initiated enforcement proceedings against TGS and its management, more than 500 TGS shareholders initiated upwards of 100 separate suits (App. 40a) in many different

[1]Principally, Rule 10b-5 (17 C.F.R. 240.10b-5) adopted pursuant to section 10 of the Securities Exchange Act of 1934 (15 U.S.C. §78j).

district courts affecting rights in 691,400 TGS shares sold by more than a thousand persons (App. 37a-38a). Many, like Petitioner Mitchell, brought suit individually, but many others, like Petitioner Reynolds, alleged that they were seeking relief on behalf of a class composed of all persons similarly situated.

These proliferated lawsuits quickly became centered in two forums. The Reynolds-Mitchell suits became centered in the District of Utah (Utah court), where they progressed with expedition through discovery, trial, and appeal on the merits, resulting in judgments in favor of the plaintiffs. A significantly larger number of suits were lodged in the Southern District of New York (New York court) where they have remained stalled for upwards of seven years in pretrial proceedings, with no resolution of the merits yet in the offing.

The Utah court entered two separate orders pursuant to Rule 23(d) striking Reynolds' class allegations on February 6, 1967 and October 13, 1967, respectively, and then proceeded to a trial on the merits commencing April 29, 1968. In the meantime, proceedings in New York had been suspended by stipulation of counsel, and neither discovery nor proceedings on the class allegations had been conducted. The Utah court announced its opinion resolving the merits in favor of the plaintiffs on October 17, 1969, and 23 days later the New York court ordered—for the first time and then only provisionally—that the cases lodged there would proceed as a class action and in a subsequent statement from the bench indicated that a substantial reason was the fact that the Reynolds-Mitchell cases had established the probability that liability was present. On November 20, 1970—after the Reynolds-Mitchell cases had been fully briefed and a scant 12 days before they were submitted for decision on appeal—the New York court submitted notice under Rule 23(c) advising the absentees for the first time that an action had been commenced in New York, but making no mention of the Reynolds-Mitchell cases.

Before judgment was entered in the trial court, Reynolds moved a third time for a *proper* determination under the Rule,

and stressed that the earlier orders had not addressed themselves to the elements the Rule specifies must be considered and that in any event Rule 23(d) permits modifications "as may be desirable from time to time." In making this third application Reynolds was supported by some of the plaintiffs from New York, who intervened to urge that the Utah proceedings were the most advantageous to the class members because, among other reasons, they had progressed by a period of years in advance of the New York cases. The third effort resulted in a published opinion dated January 13, 1970, in which Judge Ritter recited his original ruling, inferred that despite Reynolds repeated efforts over a three year period he had not been sufficiently diligent in asserting the question, and deferred to the New York proceedings. App. 36a.

Reynolds was then joined by absentee members of the class who had learned of his judgment, and they jointly sought intervention in the New York proceedings while Reynolds' appeal was pending. They alleged that their addition as parties would improve the representation within the meaning of Rule 23(d) and they suggested, as Reynolds had previously done in the Court of Appeals, that the Judicial Panel on Multi-District Litigation should be employed to secure the advantages of proceedings conducted in *both* forums to the absentee class members. Judge Bonsal, in a pique which is part of the printed record,[2] then rejected all such requests, directed that the issues already tried in the Reynolds case would be retried to a jury in his court, entered an order declaring the New York plaintiffs the *only* proper class representatives and limiting the class members who joined with Reynolds to *merely* appearing (*i.e.* they were not even permitted to file papers with the court), and then severely restricted membership in the class so that persons whose circumstances were most like those of Reynolds and Mitchell were excluded and presumptively declared

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[2]See hearing before Judge Bonsal in Cannon v. Texas Gulf Sulphur Co., 65 Civ. 1223 (S.D.N.Y.) on February 10, 1971. Judge Bonsal evi-

not to even have a cause of action. On March 26, 1971 and November 3, 1971, the New York court entertained motions to revoke the class determination altogether, on the theory that despite the outstanding Reynolds-Mitchell judgments there was no substantial possibility that plaintiffs similarly situated could prevail. If these motions are granted, the entire group of absentees will be deprived of any forum in which to assert their claims.

The Utah judgment, along with the denial of the class action, was affirmed by the Court of Appeals. Thus, the curiosity of a Utah action, with liability sans class, and a New York action with class sans liability, is the product, and Reynolds—who has obtained a judgment which will certainly benefit all of the shareholders under the doctrines *stare decisis* and collateral estoppel—is declared *not* to be a proper class representative and those similarly situated with him have effectively had summary judgment entered against them. At the same time, others—the New York plaintiffs who have consented to a seven year delay while Reynolds and SEC have actually litigated the rights of the class—are declared by fiat to be the *only* proper class representatives[3] even though the cause of substantially more than half of the class membership has been effectively abandoned.[4]

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dently viewed the intervention as an interference with the processes of his court. *Cf. Fink v. Coates*, 323 F. Supp. 988, 989-90 (S.D.N.Y., February 5, 1971) where Judge Bonsal inferred that the Utah judgment was not well reasoned. Judge Bonsal suggested that Reynolds lawyers, who had conducted the trial on the merits and the appeal, did not desire to protect the class, but were greedily attempting to establish their right to a fee.

[3]See Cannon v. Texas Gulf Sulphur Co., 65 Civ. 1223 (S.D.N.Y. order filed Mar. 8, 1971).

[4]*C.f.* Cannon v. Texas Gulf Sulphur Co., CCH FED SEC. L. REP. ¶93,071 (S.D.N.Y. June 8, 1971).

REASONS FOR GRANTING THE WRIT

With our judicial system at its very breaking point, with scandalous delays in the time required to bring a legitimate controversy to a resolution on the merits forcing the public to examine the alternatives to the judiciary as a method of resolving conflicts, the lower courts have ignored procedures which could have reversed the trend and helped restore public confidence. While the academic community and Bar Associations decry the phenomenon in which high court costs and free legal services for the poor combine to leave middle-class America *without* meaningful access to our courts[5] and permit those who are financially endowed, such as Respondent corporation, to manipulate or engineer interminable delays while the costs of litigation take their natural toll of the infinitely less powerful plaintiffs, the lower courts have squandered an opportunity for an enlightened application of the 1966 amendments to Rule 23 and the 1968 amendments to the Judicial Code (28 U.S.C. §1407) which would have provided effective relief for the "middle Americans" who are the members of the class, and significantly shortened the duration of this litigation. The opportunity thus lost may not easily be recovered, for the circumstances of this case, which have already resulted in at least fifteen reported opinions,[6] are already a classic example of

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[5]*E.g.* ABA SPECIAL COMMITTEE ON AVAILABILITY OF LEGAL SERVICE, RECOMMENDATIONS TO THE HOUSE OF DELEGATES, August 1966.

[6]SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. June 10, 1971); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. April 26, 1971); SEC v. Coates, CCH. FED SEC. L. REP. ¶ 92,251 (2d Cir. 1968) *cert. denied* 394 U.S. 976 (1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968); Texas Gulf Sulphur Co. v. Ritter (Petitioner Reynolds, real party in interest) 371 F.2d 145 (10th Cir. 1967); Fink v. Coates, 323 F. Supp. 988 (S.D.N.Y. February 5, 1971); Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990 (S.D.N.Y., February 5, 1971); Cannon v. Texas Gulf Sulphur Co., CCH FED SEC. L. REP. ¶ 93,071 (S.D.N.Y., June 8, 1971); SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970); Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 548 (D. Utah 1970); Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 566 (D. Utah, 1970); Astor v. Texas Gulf Sulphur Co., 306 F. Supp. 1333 (S.D.N.Y. 1969); Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D.N.Y. 1969); SEC v. Texas Gulf Sulphur Co., 258 F. Supp.

a complex multi-district suit which is destined to remain a guiding influence under Rule 23 for a considerable time to come.

This Court should grant certiorari to determine if we shall have a judiciary for just the elite, or if methods recently devised to remedy the defects of our system shall be implemented.

I

CERTIORARI SHOULD BE GRANTED TO IMPLEMENT THE PURPOSES OF THE 1966 AMENDMENTS TO RULE 23, AS AN EXPEDITIOUS METHOD FOR HANDLING A MULTI-PARTY CONTROVERSY

A. *The Trial Judge's Narrow Application of the Elements of the Rule Restricts Its Utility.*

> If the administration of justice by the courts is to endure, the Bench and Bar must devise and employ new procedures which will increase the efficiency and improve the quality of justice without increasing the burden on litigants. 1 MOORES FEDERAL PRACTICE Pt. 2 p. vii.

The 1966 amendments to Rule 23 were designed to overhaul the "common issue" class action, a common law equity device which American jurisprudence has struggled to perfect for over a hundred years.[7] These amendments thus represent one of a precious few recent innovative devices designed to improve the efficiency and the quality of justice. Regrettably, since its adoption the revised Rule has enjoyed a shaky history, for even the occasional statements to the effect that the Rule should be applied liberally have failed to grasp the fundamental purpose of the Rule to streamline the judiciary and have focused on its purely mechanical incidents. Worse, is the tendency of many courts to view this type of class action as an oppressive device, or as a method for solicitation of large claims by plain-

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262 (S.D.N.Y 1966); Frieman v. Texas Gulf Sulphur Co., CCH FED. SEC. L. REP. ¶ 91,627 (D. Ill. 1965).

[7]One of the earliest authorities is Smith v. Swormstedt, 16 How [57 U.S.] 288 (1853)

tiffs lawyers. These conceptual errors are evident in this case, and if not corrected they could well impair the value of the revised Rule.

The lower courts did not rest their decision on any alleged factual inadequacy, and to the contrary, it was subsequently determined that the elements of the Rule were present. See *Cannon v. Texas Gulf Sulphur Company*, 47 F.R.D. 60 (S.D. N.Y. 1969). Indeed, it was quite clear that Judge Ritter's original ruling was the result of (1) his belief that the New York courts would proceed with expedition and (2) his desire to avoid the administrative burdens of this complex multiple controversy:

> THE COURT: I am not very happy about getting a lawsuit in here with 691,000 shares of stock involved with all of those potential—high numbers of shareholders all over the country, maybe international, too—transactions. Tr. 24

The trial judge's final published opinion did not reconsider the matter, or examine the policy of the Rule in light of the ensuing events which had proven the earlier ruling to be in error, but simply attempted to justify the earlier ruling. The Court of Appeals glossed over the issue when it declined to even consider whether the Advisory Committee's concept of a streamlined procedure had been subverted, and justified its result with the cryptic conclusion that an "abuse of discretion" had not been shown. This Court should, therefore, grant certiorari to establish standards for the implementation of the Rule which will effectuate its objectives.

B. *The Lower Courts Inflexible Handling of These Equity Proceedings Conflicts With Decisions of This Court.*

> [I]s it not much fairer to society as a whole – the group that pays the bills for long-drawn-out and costly litigation —to settle as much as possible in a single suit? Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORN. L.Q. 327, 343 (1948).

The trial judge's fundamental assumption was that there could be but one class action, but there is no language in the Rule which requires or even suggests such a purpose, and to the contrary, it frustrates the plain purpose of the Advisory Committee to promote expedition and efficiency. As the circumstances of this case illustrate, it cannot be projected in advance which of two parallel proceedings will most effectively achieve their common goal, and for that reason the courts should not undertake to do so.

Moreover, the trial judge's assumption conflicts with this Court's holding that in proceedings in equity the "controversy is not a thing, and a controversy of a mere question of liability does not involve the possession or control of a thing . . . . Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Kline v. Burke Construction Corp.*, 260 U.S. 226, 230 (1922). The Court of Appeals for the Eighth Circuit has also held that one member of a class does not acquire the exclusive right to sue, or to prevent other class suits, by merely starting a suit and alleging that it is for the benefit of all having similar claims. *Partridge v. Martin*, 102 F. 2d 284, 288 (8th Cir.) *cert. denied* 307 U.S. 644 (1939). Surely the interests of judicial efficiency and the fortunes of the absentee members of the class would be better served if *both* actions were permitted to proceed, at least on a provisional basis, for unanticipated factors such as the evident reluctance of the New York counsel in this case to proceed aggressively with litigation, may demonstrate that an initial impression was not correct. The Advisory Committee evidently shared that view, for it provided that *all* class action orders were to be provisional.[8] Indeed, it may even develop that both proceedings can serve a useful function in resolving different aspects of a complex dispute, and where two proceedings are being conducted in any event, as they were in this case, no added burden is imposed on the judiciary by entering pro-

[8] See subdivisions (c) (1) and (d) of the Rule.

visional orders such as the Rule prescribes. By rejecting that approach the lower courts have read an inflexibility into the Rule which was never intended.

Viewed at the threshold, it was perhaps reasonable for Judge Ritter to accept the assurances of Respondents that the New York actions were more advanced and would proceed with expedition, but after subsequent events had proven the reverse to be true what merit was there in attempting to justify the earlier errors? The New York action was not even declared to be a class action until after the Reynolds case had been tried, and even then only provisionally under an order subject to modification at any time before the decision on the merits. But after Reynolds had already tried and determined the common *issue*, which is all that the class action is concerned with, it was simply beyond question that the fortunes of the class and the ends of judicial efficiency would be better served with him as their representative, particularly when it is considered that Judge Ritter was deferring to a forum in which the class representatives appeared most unlikely to be successful in protecting the absentees rights.[2] "Abuse of discretion," even if it were the appropriate inquiry, must comprehend such a subversion of the absentees rights.

C. *Certiorari Should Be Granted to Avoid Duplicity.*

> The King of Brogdignag gave it for his opinion that, "whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together." In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew

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[2]See App. 37a, where Judge Ritter recited that Judge Bonsal "ruled that such conduct of defendants did not violate the provisions of . . . Rule 10b-5." Yet, Judge Ritter had simultaneously ruled that the defendants conduct *did* violate Rule 10b-5, and every other Court to consider the question has agreed with him. Thus, Judge Ritter was apparently forcing the absentees to seek redress in a forum where it appeared that their claims would be rejected.

> before . . . Questions of law or fact which would otherwise be tried over and over can by this means be determined once for all in a single proceeding. This avoidance of multiplicity of suits saves the parties from needless expense and vexation, economizes the time of judges and jurymen, and frees the dockets for the affairs of other litigants. CHAFFEE, SOME PROBLEMS OF EQUITY, 149 (1950).

The Advisory Committee's sweeping 1966 revisions of Rule 23 relied heavily upon the prescient writings of Chancellor Zechariah Chaffee, Jr., *supra*, and others which are liberally quoted herein. The lower courts thwarted the Advisory Committee, however, by *mandating* that multiple lawsuits should sprout and vex the federal courts with duplicate trials—how many one can but speculate—for years to come.

If the Court of Appeals displayed lack of insight in permitting redundant lawsuits, the New York court compounded the error by further condemning the class to the "needless expense and vexation" Chancellor Chaffee had reference to. Thus, though Reynolds had already tried the common issue and resolved that aspect of the case in favor of the absentee class members, the New York court proposed to submit that same issue to a new trial, this time before a jury, with the attendant threat that the common issue might then be resolved adversely to the interest of the absentees. The degree of vexation the absentees were subjected to became evident when Reynolds approached the New York counsel directly with an invitation for them to join in an effort to merge the two actions and thereby extend the benefits of the Reynolds judgment to their own clients and all of the absentees—which was rejected in favor of an effort to employ the Utah judgment as leverage to force a settlement on terms substantially less favorable to the absentees[10] (who remain uninformed of the *Reynolds* case). The

[10]In a letter to counsel for Reynolds dated December 18, 1970, counsel in the New York proceedings declared:

> Dick [Richard Dannenberg] tells me that Judge Bonsal is still pressing for a settlement even before the disposition of your 10th Circuit case.
>
> . . . . .
>
> Our feeling, from the conferences with Judge Bonsal, is that he

Rule's requirements of notice and Court approval of any proposed settlement, and provision for improvement of class representation, seem designed to protect the absentees from such practices.

D. *The Court of Appeals' Decision Conflicts with the Foundational Decision of the Court of Appeals for the Seventh Circuit.*

> [T]here is by no means complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree. Clearly, the defendant has been afforded his day in court; he has had the opportunity to present his case fully in his own right, and he has lost. He has no more reason to litigate the entire controversy against the absentee members than he has to do so against the immediate plaintiff. . . . The defendant cannot properly complain about the way in which he is treated; he can complain only that the absentees are not also subjected to the risk of losing the case. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 713 (1941).

The cardinal transgression of the lower courts was their failure to recognize and implement the foregoing principle, for the trial judge implicity assumed that Reynolds' third effort to obtain a proper class ruling could not be entertained because it was made after the trial (but before the "decision on the merits"). That the Advisory Committee intended to to adopt a more liberating philosophy is evident in its approving citation of the Kalven & Rosenfield writings.

The trial judge quite mistakenly declared that "what the

> would just as soon not complicate the posture of the case and the possibility of settlement at this time by adding another dimension to the array of lawsuits already filed with him, at least not in this stage of the proceedings. . . . This may be shooting craps a bit; but it seems to be our best position at present.

The letter is attached as an exhibit to Petitioner Reynolds Motion to File Supplementary Brief in the Court of Appeals, and was also filed with Judge Bonsal in February 1971, in connection with the effort of appearing class members to improve the class representation.

revisionists of this rule had in mind was to *limit* these class actions," (emphasis added) (Tr. 5) viewing what the Advisory Committee had advanced as a hopeful judicial reform as a corrupt device for solicitation (Tr. 23). The Court of Appeals simply ignored the problem by declaring that the policy of the Advisory Committee was merely a collateral issue (App. 79a), and placed its decision on a supposed absence of a showing of abuse of discretion.

Surely the rights of the absentees, and Reynolds, to a speedy, efficient and economical determination of their rights cannot be considered "collateral," for the Advisory Committee clearly undertook to elevate these considerations to the status of substantive rights. That purpose is fairly certain from the frequent reference to *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 90 (7th Cir. 1941):

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent. Like many another practice, necessity was its mother. Its correct limitations must be ascertained by the experiences which brought it into existence. . . . If the defense is to create barriers, and to make litigation expensive, so as to *avoid* trial, the opposition by defendants to a single trial can better be understood and appreciated. Such a position does not appeal to the chancellor, who wants to know the truth, and to fix liabilities on the basis of the true facts.

By opting for Respondents' position, in which trials are proliferated through an application of the ethics of the casino (*i.e.*, one should not win unless he also runs the hazard of losing) the Court of Appeals not only turned its back on the enlightened approach of the Advisory Committee in which judicial efficiency is considered paramount to such illusory concepts of mutuality, but also adopted a position in conflict with that of the Court of Appeals for the Seventh Circuit. Moreover, the

lower courts ignored that the class action had been alleged consistently, for a long period prior to trial, and was thus not an after the fact effort by Reynolds in any sense. Respondents vigorously defended the case with full knowledge of Reynolds' claims of class representation, and there is no reason to assume that their conduct of the trial would have been more vigorous if the case had been provisionally declared to be a class action. Certiorari should be granted to establish that the policy of the Rule is not to be subverted by procedures such as were indulged in by the lower courts.

E. *The Court of Appeals' Decision Conflicts with Time Honored Decisions of this Court Concerning Class Actions.*

> If a mighty wind swept away all the bills of peace cases yet decided and dispelled the atmosphere of unreality that hovers about this subject, so that we could make a fresh start, we should never set up formulae about privity, community of interest, and general property right. Everybody would accept the general principle admirably stated by Judge Woolsey: "... the avoidance of multiplicity of suits by every device, which is jurisdictionally possible and practically convenient, should be encouraged and should be one of the main objectives of procedural administration, and of decisions by courts in practice cases." Then we should go on to examine the available methods of handling a multiple controversy, and the practical policies which should influence a judge in choosing among these methods.
>
> What prevents our making this fresh start now? Even if the doctrine of *stare decisis* has any proper application to a procedural problem of this sort, there is excellent authority, as we have seen; for taking the attitude suggested. CHAFFEE, SOME PROBLEMS OF EQUITY, 183 (1950).

To say the least, the lower courts handling of this question was unimaginative. To say more, it was genuinely destructive of what is possibly the most desperate need of contemporary jurisprudence.

The result is that the lower courts have pressed the modern penchant for literal due process beyond the limits of practical

logic. Common law equity jurisprudence knew no such formalism, and recognized the duty of the court "to adapt its practice . . . to the existing state of society," [11] and that "if . . . the only consideration is a persons connection with a certain interest, the purpose of justice may be accomplished in his absence," [12] particularly where the courts "had already heard whatever was worth saying." [13]

This Court adopted these principles more than a century ago in *Smith v. Swormstedt*, 16 How. [57 U.S.] 288, 302-3 (1853) when it was held that a "common issue" suit by a few may be binding on the rights of many, provided the suit is fairly conducted. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921) reaffirmed that doctrine, and held that *res judicata* may be applied *even to those who were not before the court*, if representation was adequate.[14] These, it would appear, are *substantive* rights which the Advisory Committee intended to secure. The revised Rule was designed to give the absentee class members a chance to indicate if they considered the representation to be adequate, within the meaning of this Court's decisions, and not to limit the use of class actions as the trial judge assumed. Nothing in the amended Rule, or in the Advisory Committee notes, reveals an intent to retreat from over a century of equity jurisprudence as exemplified in these holdings of this Court.

The absentees right to notice, and an election with respect to the Reynolds suit was thus denied. It is not, of course, necessary for the court to give notice simply because a complaint is filed alleging a class action, but the Rule does suggest, if not clearly declare, that if the elements specified by the Rule are satisfied the absentees have a right to notice of all matters important to an individual choice to participate or "opt out."

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[11] Taylor v. Salmon, 4 Myl. & Cr. 134, 141-2 (1838).

[12] CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY, 22-23 (2d Ed. 1847).

[13] CHAFFEE, SOME PROBLEMS OF EQUITY, 211-220 (1950).

[14] *Cf.* Hansberry v. Lee, 311 U.S. 32, 42 (1940).

This Court should declare that right to be one which may not be denied for arbitrary reasons.

F. *Strict Application of Res Judicata Frustrates the Advisory Committee's Intent.*

> But granting that there exist in the law examples of distinctions based on differences among jural relationships, does it necessarily follow that we must make distinctions on this basis as to the binding effect of class suit judgments? In other words (and without essaying facetiousness), granting that a black dog can be distinguished from a white one, the distinction is of no force when the necessity of obtaining a dog license arises. Is there not danger of falling into an attitude of unthinking formalism, like that of the old common law, when we start assuming that all legal distinctions are meritorious in and of themselves and forget that they should be constantly examined in the light of the purpose they were originally drawn to serve? Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORN. L.Q. 327, 334 (1948).

Yet, the lower courts fell into just such unthinking formalism, for they assumed that when the Advisory Committee undertook to prescribe a jural relationship which would guarantee the availability of *res judicata* (*viz.*, the notice procedures of subdivision (c) (3) of the Rule[15]), it also intended to overrule the prior decisions of this court in cases where such a jural relationship was not established. We may concede that if subdivision (c)(3) had been invoked the judgment's effect as a matter of *res judicata* would be better defined. But does it follow that because the trial judge erred and did not invoke

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[15]Pertinent provisions of subdivision (c) of the Rule are as follows:
(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

subdivision (c) (3) procedures the judgment may *not* have *res judicata* effect? The Advisory Committee notes categorically reject such an interpretation:

> [S]ubdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.

The "recognized principle" adverted to is obviously the *Ben-Hur* line of authorities. If there could be any doubt that the Advisory Committee so intended, its citation of RESTATEMENT OF JUDGMENTS §86 Comment h. (1942) renders its meaning clear:

> If, however, the conduct of the proceedings is proper, it is immaterial that the other members of the class were not given notice or did not know of the existence of the action.

Patently, the Advisory Committee did not intend to overrule those authorities, and could not do so even if it had.

Respondents urged in the lower courts, *inter alia*, that the Advisory Committee *had* overruled the *Ben Hur* line of authorities, and that the language of Rule 23(d) permitting orders "striking" class allegations to be "altered or amended *as may be desirable from time to time*" (emphasis added) was therefore a mistake, for it was intended that such orders could be altered or amended only "before the decision on the merits." Compare subdivision (c)(1) of the Rule. Putting aside the fact that *all three* of Reynolds class action motions were made "before the decision on the merits" (*viz.*, before entry of judgment), the merit of the distinction proposed is nevertheless rendered academic by the recent decision of Judge Weinstein in *Dolgow v. Anderson*, CCH FED. SEC. L. REP. ¶93,249 (E.D.N.Y. October 21, 1971). Judge Weinstein held, while dismissing the class aspects of a case which he had previously determined to be a class action, that "[s]hould the individually named plaintiffs ultimately prevail . . . the court could then consider re-instatement of the class action." *Id.* at page 91,537. Thus,

even if Respondents were correct—which seems improbable under the significantly different language of the two subsections—Reynolds should have been permitted to pursue his class action, for he asked Judge Ritter to do exactly what Judge Weinstein held that he should have done. Moreover, Judge Weinstein's views should be accorded great weight, for he was one of the architects of the Rule.[16]

To require such a strict adherence to *res judicata* is to vitiate the purpose of the common question class action, for then "the rule is reduced to saying that where it is impracticable to bring all the parties before the court they must nevertheless be brought before the court." [17]

II

THE WRIT SHOULD BE GRANTED TO INSURE AN EXPANSIVE USE OF THE JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION

Petitioners urged on appeal that the provisions of 28 U.S.C. §1407 dealing with coordination of multi-district litigation should be applied to avoid the unfortunate results of this case.[18] These provisions have never been construed by this Court. They, like Rule 23, represent creative efforts to modernize a creaky judicial system, and this case presents a unique opportunity to breath life into these provisions.

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[16]Judge Weinstein, who was then a professor of law at Columbia, is the author of Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960) which was cited liberally and relied upon by the Advisory Committee.

[17]Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 700 (1941).

[18]There is a conceptual problem in that 28 U.S.C. 1407 deals *exclusively* with pre-trial proceedings, but it is *only* a conceptual problem, for if the class action ruling were reversed there would, indeed, be pretrial "proceedings" (*viz.*, class action proceedings) yet to be conducted in the *Reynolds* case, even though it has been determined on the merits. Reference to pretrial proceedings, rather than to *cases* at pretrial stage, would admit the construction urged by Petitioners.

The opinion of the Court of Appeals contains no reference to Petitioners urging for solution of the problem by reference to the Multi-District Panel, though that is an appropriate solution to the dilemma. Title 28 U.S.C. §1407(b) even permits the designation of a judge to serve in the transferree district. Failure to invoke these procedures resulted in further delays to the absentee class members.

III

THE DECISION CONFLICTS WITH THIS COURT'S RECENT PRONOUNCEMENTS CONCERNING RECOVERY OF COSTS OF CONDUCTING THE ACTION

A mythical Lilliputian visitor would surely marvel at a judicial system which could produce the curiosities of this case. Reynolds and Mitchell, in a literal sense, are forced to play the role of a private attorney general. The beneficiaries of their services are the public, which obtains the cleansing effect of exposure of fraud conducted in the market place and the formulation of legal standards to deal with the unique problems which are presented, and the absentee class members, whose benefit is a direct pecuniary one.

In a "common question" class action such as this one, where an individual's stake is modest[19] when compared with the enormous economic power of his opponents, the plaintiff cannot effectively litigate his rights without the strength of numbers. Thus, the availability of the class action rises to the status of substantive right—for *both* the representative and the absentee class members.

The notes to subdivision (b)(3) of the Rule indicate that it was designed by the Advisory Committee to be read in that manner, for the Advisory Committee declared that the Rule is to "achieve economies of time, effort and *expense*" (emphasis

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[19]Reynolds total interest amounts to $12,000, while the interest of the class is, at a minimum, $14,000,000 (App. 75a-76a). Reynolds' expert witness fees alone, without regard for legal fees, will largely deplete his judgment. R. 740.

added). The fundamental purpose of subdivision (b)(3) to avoid expense becomes crystal clear when it is considered that the Advisory Committee's *sole* citation to the foregoing statement was CHAFFEE, SOME PROBLEMS OF EQUITY 201 (1950):

> Hence it was far cheaper and more convenient to have a single suit in chancery, which was accustomed to handle polygonal controversies . . . . it was an obvious waste of time to try the common question of law and fact over and over in separate actions . . . . It was much more economical to get everybody into a single chancery suit and settle the common questions once and for all. . . .
>
> From such a bill of peace it was a natural step to a representative suit. The very identity of interests which made it easy to bring everybody in, also made it somewhat superfluous to do so.
>
> If the claims of A,B,C, and D were exactly like those of E,F,G, and H, and if A,B,C, and D were stout fellows, would not they be able to say all that could be said for E,F,G, and H as well on their own behalf?

Reynolds and Mitchell have surely demonstrated that they are such "stout fellows." No reason is evident why the absentees should be required to suffer the expense of duplicating their efforts, or why they should be required to bear those expenses alone.

This Court has recognized this policy in cases which are very similar to class actions. Thus, in *Mills v. Electric Auto Lite, Co.*, 396 U.S. 375 (1970) it was held that where a party establishes a violation of the securities laws which has the effect of benefiting a large group of shareholders similarly affected, the plaintiff should be "reimbursed . . . for the costs of establishing the violation." [20] The *Mills* case is thus an en-

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[20] The rationale, which is an expansion of earlier precedent concerning situations in which the plaintiffs efforts result in the establishment of a "fund" *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939), was that "to award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have to pay them had it brought suit." 396 U.S. 375 at 396.

largement of the doctrine of *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); where this Court taught that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

The relationship of these propositions to the substantive rights of Reynolds, Mitchell and the absentee class members is simple and direct. If society cannot devise methods to assure that those in Reynolds and Mitchell's position may recover their outlay, suits by those in their position will quickly disappear, for Reynolds' modest $12,000 stakes does not justify such exorbitant costs. The rights of thousands of absentees, and policy considerations vital to the public, hang in the balance, for without persons such as Reynolds who are willing to champion the cause of a faceless multitute the interests of the absentees will be lost by default.

Under any concept of the class action, the absentee holders of 691,400 shares are benefited by Reynolds and Mitchell's actions within the meaning of this Courts *Mills* decision. Respondents reply in the lower courts that Reynolds *chose* to pursue his own class action rather than assume the position of a non-appearing class member in the New York proceedings is not persuasive, for there was no class action in New York at the time of Reynolds' trial. Moreover, the fundamental assumption in class proceedings is that the representative *will* be self appointed. Even if there had been a New York class action at the time, the Rule nevertheless assumes that if a class member is convinced that those managing a suit will do so badly, or for any other reason is dissatisfied with the representative proceedings, he may improve the representation or even initiate his own action.[21]

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[21] CHAFFEE, SOME PROBLEMS OF EQUITY, 230 (1950):

> Furthermore, although the unnamed members of a class may have no constitutional rights to a day in court, considerations of fairness still survive. Surely, in the future, common decency requires some sort of steps to be taken to apprise people that litigation is under way which seriously affects their life insurance policies or other financial expectations. They ought to be in-

The wisdom of that construction is evident if one considers the position of the absentee class members. Without Reynolds' self-appointed efforts, there would be no judgment today. Moreover, if Reynolds had not volunteered the efforts necessary to properly resolve the common issues, and had lost, can there be any doubt that TGS would have proposed the adverse Reynolds judgment as a bar to the New York proceedings?

The attitude of Judge Bonsal, when Reynolds joined with other absentee class members in seeking intervention in New York to secure the benefits of his adjudication of the common issues to the class, was destructive of these ends. The trial judge is the guardian of the class interest, and his practice should be adapted to proposals such as Reynolds advanced which would secure the absentees rights. Moreover, as Reynolds made clear in his attempted intervention and has made clear herein, he did not consider himself engaged in a sort of race with the New York plaintiffs or in any sense in competition with them, and Judge Bonsal took too narrow a view of the matter when he suggested that Reynolds proposed to supplant, duplicate or denigrate the efforts of the New York court. But if, as this court has declared, a proceeding in equity is viewed as a controversy and not a thing, no reason is apparent why two different proceedings in two different courts, may not simultaneously resolve different phases of the same controversy. If they do, no reason is apparent why the efforts of either court should be duplicated, which is all that Reynolds suggested in his New York intervention.

CONCLUSION

The task of improving the quality and efficiency of justice in the United States is one which commends the energy of this Court. This case presents an exceptionally good vehicle for the

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formed as well as represented. They ought to have some notion of what is going on, some chance to see whether the actual parties in the case are doing a competent job. What sort of lawyers have they engaged? How hard are they fighting? Will more money help, and how much?

achievement of these goals because of the restrictive handling of the class action and multi-district problems by the lower courts. Moreover, the result, in which Reynolds and Mitchell have been denied recovery for expenses incurred for the benefit of the entire stockholder group, and the absentee class members have been denied the benefits of the Reynolds-Mitchell judgment, illustrate the maladies of the system in microcosm. Because of the extraordinary publicity which has been given this case, it is very possibly the most appropriate vehicle for the accomplishment of judicial reform which could be proposed.

Respectfully submitted,

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